# commerce cruelty

*Mark Gregory*

## *Should battery farmers be exempted from animal welfare legislation?*

Legislation dealing with cruelty to animals is an excellent example of an area of public law operating to advance the private rights of capital. The result is to defeat the public purpose of the legislation and an object lesson in how public law is subordinate to the rights of private property.

On 24 February 1993 Hobart magistrate P.J.A. Wright found a corporate battery hen farmer guilty of seven counts of cruelty under the Tasmanian *Cruelty to Animals Prevention Act 1925* (since repealed). The convictions related to each of seven hens purchased from the battery farm *(Clarke v Golden Egg Farm Pty Ltd*, unreported, Hobart Magistrates Court, Case No. 36539/92).

The case represents a rare occasion on which cruelty to animals legislation has been used against an institution, as opposed to a conviction for small scale, domestic cruelty. For the battery hen and battery pig industries, the ramifications of the decision are clear. Even more strikingly, the magistrate found cruelty despite the treatment of the hens complying with relevant industry codes of practice.

Even while the ink was drying on the magistrate's judgment, the Tasmanian Liberal Government was moving to legislate it into oblivion. The Tasmanian Labor Party, in its two years in office, broke an election promise to introduce a five-year phase-out of the battery cage. The scheme involved repeal of the existing Act, and its replacement with the new *Animal Welfare Act 1993.*

The new Tasmanian Act prohibits cruelty by s.8:

> A person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to any animal.

Section 8(2) lists examples of offences, including if a person 'overcrowds an animal' (s.8(2)(b)). Aggravated cruelty is also prohibited, and defined as cruelty 'which results in the death or serious disablement of an animal' (s.9). These provisions would certainly encompass battery animals, but the Act makes provision for regulations which can provide that, among other things:

> any provision of this Act does not apply to any specified animal or class or kind of animal, matter, practice or person. (s.50(3))

In other words, the regulations may exempt whole classes of animals or people from the provisions of the Act, such as the cruelty provisions. On 1 January 1994 the *Animal Welfare Regulations 1993* came into effect, providing by reg.5(1) that the cruelty provisions of the Act do not apply:

> to the keeping of domestic fowls in cages if -
>
> (a) those fowls are kept for the purpose of commercial egg production; and
>
> (b) the management of these fowls is carried out in accordance with the animal welfare standards.

The 'animal welfare standards' (s.44) are standards approved by the Minister, in consultation with the new Animal Welfare Advisory Committee (see s.39). This committee consists of several farming and sporting representatives, one RSPCA member, a veterinarian and several public servants. They equate to the 'codes of practice' referred to in other

*Mark Gregory is a Sydney solicitor.*

jurisdictions (see p.189).

All Australian State and Territory jurisdictions have legislation in different forms dealing with the treatment of animals. A summary of the major provisions of each is given on page 189.

## The exemption of battery farming

The tendency towards exceptions to the general cruelty provisions for battery hens seems clear. The exceptions sometimes exist in the Act itself (NSW 'confinement' provisions), in regulations (SA and Tasmania) or in codes of practice (Victoria).

The correctness of excepting arguably the most needy class of animals from the cruelty legislation is clearly questionable, at least if it is accepted the cruelty legislation has as its basis the prevention of suffering in animals. This may seem obvious, but in fact alternative justifications have been advanced for this type of legislation.

Some South African cases developed the proposition that cruelty to animals is wrong because it offends human sensibilities. As Tony Karstaedt points out, such sensibilities are misplaced if in fact animals do not suffer.[1] Such misplaced sensibilities should not be protected by statute law. It makes more sense if the legislation is based on the view that animals do suffer pain in essentially the same way as humans do, and the law should seek to minimise such suffering because it is the moral duty of humans to do so, as animals are not in a position to protect their own interests.

Of course, laws are rarely absolute. There are usually situations in which an otherwise illegal action is acceptable, depending on the context. This principle underlies the presence, in most cruelty legislation, of phrases such as 'without reasonable excuse'. Thus, the protection of animals is limited in some circumstances. A limitation based on the vested commercial interests of battery farmers is unacceptable.


The lower egg prices involved in battery production is not the basis of the exemption, but merely an effect of it. Even as a justification for battery production, it suffers the same flaw as the commercial interests of farmers, as discussed in succeeding paragraphs.

In our society we recognise a hierarchy of rights and interests. When a higher level right or interest comes into conflict with a lower level one, the lower level one must give way. For example, the right to live free from violence is regarded more highly than freedom of movement. One person's right to live free from violence should not be limited by another's freedom to move, but the contrary is not true. That is, one person's freedom of movement can be limited in protecting another's freedom from violence. Even anticipated violence is sufficient to justify limitation of freedom of movement, as restraining orders and apprehended violence orders show.

Similarly, our interest in living free from unjustified attacks on our reputations is highly protected (defamation laws), and generally placed above our interest in having full access to information, a lower level interest.

Throughout our system of laws we see this hierarchy of personal and public rights and interests reflected. It is submitted that the reason the exemption of battery hens from cruelty provisions appears so objectionable is that it subverts a higher interest to a lower one. If we accept the protection of sentient beings from suffering is a moral duty of humans (as animals are not in a position to protect themselves), and this duty is based on the reasoning that animals experience physical suffering in much the same way as humans, it is inappropriate that laws based on this moral duty be subverted to commercial interests. The interests of commerce are qualitatively different – and lower on a moral scale – than those of physical protection.

The exemption in favour of commerce is even more objectionable because it is unnecessary. Battery systems of farming have been phased out in Switzerland, and become illegal this year in The Netherlands, after a phase-out period.

A phase-out in Australia should be coordinated nation-wide, so no farmer enjoys a competitive advantage from not having to meet conversion costs, or higher production costs under a humane system of egg production. As increased costs are passed on to the consumer, the individual farmers' commercial interests are not adversely affected in a coordinated Australia-wide phase-out.

## Codes of practice

The efficacy of codes of practice should also be examined. Although codes of practice are given statutory recognition in most jurisdictions (Vic., Qld, SA, Tas. and ACT) their status is unclear. Only in South Australia, Victoria and Tasmania is there an express legislative statement that compliance with approved codes of practice will circumvent any illegality under the cruelty provisions (SA s.43; Tas. reg.5(1); Vic. s.6(c)).

In the other jurisdictions, the status of codes of practice is less clear. In the ACT approved codes of practice are stated to be 'disallowable' (by the Legislative Assembly) under the *Subordinate Laws Act 1989* (ss.23, 24 of *Animal Welfare Act*). These provisions may be an attempt to give codes of practice the legal effect of regulations. Alternatively, perhaps it is intended that compliance with a code of practice will shield an act of cruelty behind the 'unnecessary, unreasonable or unjustifiable' exemptions in the Acts. Given the result of the Tasmanian case, where a breach of the Act was found despite compliance with industry codes, the effectiveness of codes of practice in the ACT should be challenged in the courts if a test case arises. A similar system operates in Victoria, where codes must be tabled in Parliament and are subject to being disallowed (s.7(4)). However, s.6 specifically shields acts done in accordance with codes of practice.

In Queensland the possibility of incorporation of codes in the regulations exists, but has not been pursued. Therefore in

Queensland, as well as in the jurisdictions where codes have no statutory recognition (NSW, WA and NT) compliance with codes of practice should not be seen as a protection against prosecution.

The reason compliance with codes of practice was found not to be a defence in Tasmania, and why it should not be in other jurisdictions, is that current codes allow most of the objectionable practices of battery farming to continue. For example, debeaking is specifically recognised, as are multi-deck cages with minimal space for birds. Each hen is allowed ten centimetres of trough space for feeding. That cannibalism (one of the signs of severe behavioural dysfunction in battery hens) will occur is also recognised. These specifics are taken from the Victorian code of practice, but codes are similar Australia-wide as they tend to draw on a single code prepared by the Agricultural Council of Australia and New Zealand.

## Regulations

Once legislation is passed, regulations exempting types of animals or practices from the cruelty provisions may well significantly cut away the scope of the Act. While regulations as delegated legislation have statutory force, they are only legitimate if 'not inconsistent' with the Act. There is an argument that regulations exempting types of animals are *de facto* inconsistent simply because the original purpose of the Act is in part defeated.

This argument has less force in Tasmania and South Australia where the Acts specifically state that regulations can exempt classes of animals (Tas., s.50(3); SA, s.44(2)(g)). The argument is stronger where the Acts state that regulations must be 'not inconsistent' (NSW, Qld, ACT and NT) but may also hold in other States (WA and Vic.).

Of course the embodiment of a power of exemption in an Act may be seen to reflect legislative intent but difficulties arise as a result of the minimal levels of scrutiny parliaments give to delegated legislation. In NSW, for example, the *Subordinate Legislation Act 1989* does provide a mechanism whereby proposed regulations must be made subject to a regulatory impact statement available for public comment. How effective this mechanism has been is unknown but worthy of study. Other States may well have similar mechanisms, but the point is that parliaments and the public rarely have the opportunity to assess regulations to see if there is any inconsistency with the original purpose of an Act, and parliaments rarely disallow regulations once they are passed.

## Enforcement

An even greater problem is that, even with the existence of codes of practice, battery farmers are routinely ignoring them. They are able to do this because penalties are in some cases so low as to provide absolutely no deterrent,[2] and because detection of offences is difficult. Detection is made difficult for several reasons. First, evidence is difficult to obtain as battery farms are usually high security compounds, closed off to public scrutiny. Evidence has typically only been obtained by animal rights activists infiltrating in the guise of employees, or by the farmer 'shooting himself in the foot', as in the Tasmanian conviction, by selling hens to activists.

Second, in most jurisdictions, rules of standing prevent animal rights activists from instigating court actions. In Queensland and Western Australia, only members of the police force can instigate proceedings, although they may do so on the complaint and information of any other person (Qld, s.10; WA, s.9). In Victoria and the Northern Territory, proceedings may be instigated by members of the police force and other officers appointed under the relevant Act. These other appointments are limited to local council officers, certain public servants, and officers of the RSPCA.[3]

The inherent problem with artificial limitations on standing in animal welfare legislation is much the same as is involved in environmental litigation. In both spheres, the private interests of individuals are rarely infringed, particularly in the larger matters of public concern. For example, even gross breaches of cruelty provisions do not infringe any person's private interests. Therefore, wide standing rules are required, so community values can be brought to bear in testing for infringements of the legislation. Animal rights activists are the natural agents to bring cases to test the legislation.

Even in those jurisdictions where there is no statutory limitation on standing (Tas., NSW, SA, ACT), the ability of animal rights groups to commence actions is severely limited by the difficulties in gathering evidence. The Tasmanian case is a foundation for the principle that committed animal activists have sufficient interest in the matter to satisfy common law standing requirements.

## Conclusion

The current framework of animal welfare legislation in Australian jurisdictions is both conceptually wrong, and in any case is not working. The remedies are as follows:

- A coordinated Australia-wide phase-out of battery farming. This should be done at the level of legislation, and not merely in codes of practice. The cruelty provisions should not be subject to exemption through regulations or codes of practice. Codes of practice can provide the details of acceptable methods. Non-compliance with the codes of practice should be made an offence, but compliance with codes of practice should not be a defence. In this way established practices may be challenged as community attitudes to cruelty change.
- Tougher penalties.
- Increased scrutiny of farming activities.
- More liberal rules of standing.

In these ways Australian animal welfare legislation will not only have logical consistency, but will be responsive to community attitudes towards animal protection, rather than glossing over the public interest in favour of private commercial interests.

### References

1. Karstaedt, A.O., 'Vivisection and the Law' in (1982) 45(4) *Journal of Contemporary Roman-Dutch Law* 349 at 351-2. The writer also thanks Tony Karstaedt for a copy of an unpublished paper, from which many of the background materials for this article are drawn.
2. In the Tasmanian conviction, the farmer was fined $100 for each count, a total of $700. Given the low likelihood this farmer would provide the evidence to be convicted again, there is virtually no incentive to change current practices. Under the old Tasmanian Act, the maximum penalty was $400 or three months imprisonment, so $100 for each count can be viewed as light. Maximum penalties under the general cruelty provisions in other jurisdictions are: NSW $2000 or six months; Vic. $1000 or three months; Qld $1000 or three months (with a specified minimum of $50); SA $10,000 or 12 months; WA $5000 or 12 months; Tas. (current Act) $5000 or 12 months; ACT $10,000 or 12 months; NT $200 or six months.
3. In Victoria, the Act refers to a 'full-time officer' of the RSPCA (s.24). In the Northern Territory, the reference is to 'agents of a society for the prevention of cruelty to animals' (s.15). It is understood that there is no branch of animal liberation in the Territory, but the section as worded might allow an interstate animal rights group to bring an action in the Territory.

## LEGISLATION IN STATE AND TERRITORY JURISDICTIONS

The Tasmanian response is interesting both because it shows clearly the attitude of politicians in the face of powerful vested commercial interests, and because it is indicative of a tendency in other Australian jurisdictions to make an exception in the case of battery farming.

The relevant legislation in **New South Wales** is the *Prevention of Cruelty to Animals Act 1979.* It prohibits cruelty to animals (s.5) and aggravated cruelty to animals (s.6). Cruelty is not defined, but rather left to be determined by community standards. Some examples of cruelty are provided in section 5(3) (for example, failure of a person in charge of an animal to alleviate pain). Aggravated cruelty is also not defined.

The NSW Act contains a provision that confined animals must be exercised (s.9(1)). This, however, offers no relief to battery animals as it does not apply to 'stock animals', defined to include 'swine' and 'poultry' (s.4 definition of 'stock animal').

Regulations 'not inconsistent with this Act' may be made (s.35) relating to, among other things, 'the conditions under which any animal or species of animal may be . . . confined . . .' (s.35(1)(a)(i)). At present no regulations exist providing broad exception for battery animals.

In **Victoria** the *Prevention of Cruelty to Animals Act 1986* prohibits cruelty (s.9). In this Act cruelty is defined by a long list of activities, several of which would encompass the treatment of battery hens, for example 'knowingly' doing an act which results in 'unnecessary, unreasonable or unjustifiable pain or suffering' to an animal. Aggravated cruelty is also prohibited (s.10), and defined as cruelty resulting in 'death or serious disablement' to an animal.

Scope is left for the exemption of battery farming through the promulgation, in the Government Gazette, of codes of practice (s.7). Codes may specify 'procedures for the keeping, treatment . . . care, use, husbandry or management of any animal or class of animals . . .' A code 'takes effect' from the date of publication in the Government Gazette (see the article on the legal effect of codes of practice).

Section 42 provides that regulations may be made and may deal with, amongst other things, the 'conditions under which animals may be kept in captivity, including the sizes of enclosures and cages' (s.42(1)(c)). The regulations may incorporate the provisions of codes of practice (s.42(2)(d)(i), but none of the existing regulations do so, or deal in any way with battery farming.

The **Queensland** *Animals Protection Act 1925-1991* defines 'cruelty' as 'unreasonable, unnecessary or unjustifiable ill treatment' and then goes on to make offences of numerous listed acts of cruelty, including to 'confine (otherwise than for the purpose of conveying, carrying or packing) any animal in such manner or position as to subject such animal to unnecessary pain or suffering' (s.4(1)(da)).

Regulations, 'not inconsistent with this Act' may be made, and such regulations may adopt 'any standards, rules, codes or specifications of any body identified in the regulations' (s.23). This would allow for exceptions in the case of battery animals, including the giving of legislative force to industry codes of practice. Although, at present, no such exception exists in Queensland, it is understood that animal activists are reluctant to litigate for fear of a legislative response similar to that in Tasmania.

Note: a new Queensland Bill is in the early stages of preparation.

In **South Australia** the *Prevention of Cruelty to Animals Act 1985* makes it an offence to 'ill treat' animals (s.13). The term 'ill treat' is left undefined, but a partial list of examples is provided, including, if a person

> (a) deliberately, or unreasonably causes the animal unnecessary pain;
>
> . . .
>
> (l) cages, tethers or otherwise confines the animal in a manner contrary to the regulations.

The SA Act purports to make clear the position of codes of practice. Section 43 provides:

> 43. Nothing in this Act renders unlawful anything done in accordance with a prescribed code of practice relating to animals.

And s.44 allows for the making of regulations which can, amongst other things, 'exempt, conditionally or unconditionally, any person or class of persons or any animal or class of animals from any provision of this Act . . . ' (s.44(g)). The regulations may incorporate, by reference, any code of practice (s.44(3)).

The *Regulations under the Prevention of Cruelty to Animals Act 1985* (No.130 of 1986) incorporate 'the Code of Practice for the Welfare of Animals, the Domestic Fowl, published in the Gazette on 24 April 1986 at p.1026'. The prescribed code applies 'only to persons who carry on the business of keeping poultry' (regs.14(1) and (2)).

In **Western Australia** the *Prevention of Cruelty to Animals Act 1920-1987* makes it an offence to 'ill treat' animals (s.4(1)(a)). 'Ill treat' is defined as including:

> wound, mutilate, overdrive, override, overwork, abuse, worry, torment, and torture; also knowingly overload and knowingly overcrowd and unreasonably, wantonly, or maliciously beat (s.3(1)(f)).

Section 4(1) prohibits ill treatment, and other activities, including to:

> (e) convey, carry, or pack, or cause to be conveyed, carried, or packed, any animal in such manner or position as to subject or be likely to subject such animal to unnecessary pain or suffering; or
>
> . . .
>
> (n) knowingly permit cruelty.

Cruelty is left undefined, but includes all the acts listed in s.4 (see s.3(a)(i) definition). Regulations may be made under the Act (s.25), but none exist dealing with battery farming.

By the **Australian Capital Territory** *Animal Welfare Act 1992,* s.7:

> A person shall not, without reasonable excuse, commit an act of cruelty on an animal.

'Cruelty' is undefined, as is 'reasonable excuse'. Section 8(1) further provides that a 'person shall not, without reasonable excuse, deliberately cause an animal unnecessary pain'.

It is also prohibited for a person in charge of an animal, without reasonable excuse, to 'fail to provide it with appropriate, and adequate, food, water, shelter or exercise . . . ' (s.8(2)(a)). And s.9(2) states:

> A person shall not, without reasonable excuse, confine an animal in a manner that causes injury, pain, or undue stress to the animal.

Part III (ss. 21 to 24) provides for the Ministerial approval of codes of practice (s.22) relating to, among other things, 'animal welfare in intensive farming' (s.21).

Section 112 allows for the making of regulations, 'not inconsistent with this Act', which can relate to any relevant matters, including the 'confining, housing or transport of animals.' The regulations can incorporate approved codes of practice (s.112(4)).

The **Northern Territory** *Prevention of Cruelty to Animals Act 1935* makes it an offence to 'ill treat' or to cause 'unnecessary pain to', any animal (s.4(1)(a)). The Act also penalises a list of specified examples of ill treatment (s.4). 'Ill treat' is defined as including:

> (a) cruelly wound, mutilate, overdrive, override, overwork, abuse, worry, torment or torture;
>
> (b) knowingly overload or overcrowd;
>
> . . . (s.3).

Regulations may be made that are 'not inconsistent with' the Act (s.25), although it is believed that no regulations under the Act exist.

A summary of the Tasmanian Law is contained in the article.